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NO. 87-6977

Supreme Court, U.S.
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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

HARRY NICKS,

Petitioner,

RECEIVED

JUN 15 1988

OFFICE OF THE CLERK
SUPREME COURT, U.S.

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

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QUESTIONS PRESENTED FOR REVIEW

- I. SHOULD THIS COURT GRANT CERTIORARI WHERE NONE OF THE ISSUES PRESENTED WERE RAISED OR DECIDED BELOW?
- II. SHOULD THIS COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE USE OF EVIDENCE OF AN UNADJUDICATED CRIME IN A CAPITAL SENTENCE PROCEEDING WHERE THAT ISSUE DOES NOT EXIST IN THIS CASE?
- III. SHOULD THIS COURT GRANT CERTIORARI TO CONSIDER THE ISSUE REGARDING PROSECUTORIAL ARGUMENT AS TO THE JURY'S ADVISORY SENTENCE VERDICT WHERE PETITIONER'S ARGUMENT IS BASED ON INACCURATE STATEMENTS OF LAW AND FACT.

PARTIES

The caption contains the names of all parties in the Court below.

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OPINIONS BELOW

Petitioner's conviction and sentence were affirmed by the Court of Criminal Appeals of Alabama. Nicks v. State, 521 So.2d 1018 (Ala.Cr.App. 1987). The decision of the Court of Criminal Appeals was affirmed by the Supreme Court of Alabama. Ex parte Nicks, 521 So.2d 1035 (Ala. 1988).

Code of Alabama 1975, §13A-5-49(2)

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

Code of Alabama 1975, §13A-5-51(1)

(1) The defendant has no significant history of prior criminal activity;

JURISDICTION

The Court has no jurisdiction in this case because none of the questions presented were raised in the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Amendment XIV
(in pertinent part)

... No state shall ... deprive any person of life, liberty, or property, without due process of law; ...

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, §13A-5-40(a)(2)

- (a) The following are capital offenses:
...
(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

Code of Alabama 1975, §13A-5-47(e)

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

A. Statement of the Facts

On March 5, 1983, petitioner shot and killed Robert Back during a robbery of a pawn shop owned by Back in Bessemer, Alabama. Nicks v. State, 521 So.2d at 1020-1021.

B. Proceedings Below

Petitioner was indicted on March 25, 1983, by the Grand Jury of Jefferson County, Alabama, for the capital offense of murder during the course of a robbery in the first degree in violation of Code of Alabama 1975, §13A-5-40(a)(2). Nicks v. State, supra. Petitioner was tried for and convicted of this offense in May 1984. At a separate sentence proceeding the jury recommended that petitioner be sentenced to death. Id. The trial court, after an independent weighing of the aggravating and mitigating circumstances, accepted the recommendation and sentenced petitioner to death. Id.

Petitioner's conviction and sentence were affirmed by the Court of Criminal Appeals of Alabama on January 27, 1987. Id. A petition for writ of certiorari was granted as a matter of right by the Supreme Court of Alabama, which on February 12, 1988, affirmed the decision of the Court of Criminal Appeals. Ex parte Nicks, 521 So.2d 1035 (Ala. 1988).

ARGUMENT

I. THIS COURT HAS NO JURISDICTION AS TO EITHER OF THE ISSUES PRESENTED BECAUSE THEY WERE NOT RAISED OR DECIDED BELOW.

Petitioner here raises two issues, one regarding alleged reference to an unadjudicated crime at the sentence phase and the other regarding alleged comment by the prosecutor on the advisory nature of the jury's sentence verdict. The Court should not grant certiorari as to either of these issues because they were not properly raised at trial or on appeal.

Petitioner claims that the matter of the unadjudicated crime was raised at trial by means of his motion in limine (petition, pp. 4-5). This is incorrect. Alabama law is clear that an adverse ruling on a motion in limine does not preserve the issue for review, and that an objection must be made at the time the evidence is actually offered. Odom v. Schofield, 480 So.2d 1217, 1218 (Ala. 1985). This was not done at the time the alleged arguments based on the unadjudicated crime were supposedly made at the sentence phase (R. 732, 774).¹ There was thus no proper objection to this matter at trial.

On appeal the Court of Criminal Appeals did discuss at length the admissibility of the evidence of the collateral crime at the guilt phase; however, no issue was made of any alleged reference to this crime at the penalty phase. Nicks v. State, 521 So.2d at 1025-1031. Nor was the issue now presented discussed by the Alabama Supreme Court. Ex parte Nicks, 521 So.2d 1035 (Ala. 1988).

Regarding the other issue, involving allegedly improper comment on the advisory nature of the jury's sentence verdict, this also was not objected to at trial. Nor was the issue raised or decided on appeal. Nicks v. State, supra, affirmed, Ex parte Nicks, supra.

¹Under argument II respondent takes the position that there were in fact no arguments made at the penalty phase based on this collateral crime.

With regard to the second issue petitioner argues that a statement by the Court of Criminal Appeals regarding "plain error," applicable in Alabama capital cases under Rule 45A, A.R.A.P., constituted appellate review of this issue, and essentially any and all other conceivable issues, even though they were not raised at trial or on appeal. The Eleventh Circuit has recently rejected a similar argument in the federal habeas corpus context, that Alabama's plain error rule opens up for habeas review any claim even if not directly raised before any state court. Julius v. Johnson, 840 F.2d 1533, 1545-1547 (11th Cir. 1988). This is consistent with this Court's decision in United States v. Frady, 456 U.S. 152, 162-165 (1982), that the plain error rule of Rule 52(b), F.R.Cr.P., does not act as a waiver of procedural default for purposes of review under 28 U.S.C. §2255. Julius also follows traditional notions of comity, under which federal courts should not review issues which the state courts have been given no fair opportunity to decide. Consideration of petitioner's claim regarding alleged comment on the nature of the jury's sentence verdict would serve to encourage defense attorneys to "sandbag" by withholding arguments until federal court review could be obtained.

This Court has no jurisdiction to decide issues not raised in the court below. Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). Because neither of the two issues presented here was raised at trial or on appeal, the Court should deny certiorari.

II. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE USE OF EVIDENCE OF AN UNADJUDICATED COLLATERAL CRIME IN A CAPITAL SENTENCE PROCEEDING BECAUSE, CONTRARY TO PETITIONER'S ARGUMENT, THAT ISSUE DOES NOT EXIST IN THIS CASE.

Petitioner asks this Court to grant certiorari to consider whether the use of evidence of an unadjudicated collateral crime at a capital sentence proceeding is unconstitutional.

The Court should deny certiorari because that issue does not exist in this case.

In the guilt phase of petitioner's trial the trial court allowed into evidence testimony of another robbery committed by petitioner ten days after and one block away from the crime for which he was charged. The state's theory was that this evidence tended to establish the identity of petitioner as the perpetrator of the charged crime. On appeal the Alabama Court of Criminal Appeals upheld the trial court's decision on two different grounds. First, the Court of Criminal Appeals held that the similarities in the crimes did tend to establish that the perpetrator of one also committed the other. 521 So.2d at 1025-1031. Second, petitioner's statement to his victim in the second robbery that if he (the victim) did not lay down he (petitioner) would kill him like he "did the man up the street" constituted an admission. Id.

In contrast, therefore, to the cases cited by petitioner regarding an alleged split among various jurisdictions on the admission of evidence of unadjudicated collateral crimes at the sentence stage, the evidence of other criminal activity was used in this case at the guilt phase for the narrow purpose of establishing identity.

Moreover, Alabama law specifically prohibits the use of unadjudicated collateral crimes in capital sentencing. Aggravating circumstances under current Alabama law are limited to those provided under Code of Alabama 1975, §13A-5-49. The only aggravating circumstance under this section to which the defendant's prior criminal activity is relevant is that under §13A-5-49(2), which provides as follows:

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

(emphasis added). A conviction is specifically required to establish this aggravating circumstance. Regarding mitigating circumstances, Code of Alabama 1975, §13A-5-51(1), provides as a mitigating circumstance that

(1) The defendant has no significant history of prior criminal activity;

The Supreme Court of Alabama has held that only convictions can be considered to disprove the existence of this mitigating circumstance, Cook v. State, 369 So.2d 1251, 1257 (Ala. 1978).²

Petitioner thus has no complaint with current Alabama law regarding the admission of unadjudicated collateral crimes at the sentence stage.

Petitioner attempts, nonetheless, to shoehorn his case into the category of cases where such convictions were used at sentencing by claiming that the prosecutor utilized the collateral crime in his case in argument at the sentence stage. This is not supported by the record. Petitioner cites two portions of argument as the basis for his claim. The first is apparently the following:

We are not going to introduce a whole lot of evidence during the sentencing phase of the trial. You have already heard all the evidence of the trial itself.

(R. 732) (A copy of this page of the record is attached as part of the appendix). This is, of course, only a general reference to the guilt stage evidence as a whole and does not draw attention in any way to the collateral crime.

The second portion of argument came during the course of the state's argument for the existence of a particular aggravating circumstance, that petitioner has previously been convicted of another capital offense or a felony involving the use or threat of violence to the person. The prosecutor had stated earlier that in proving this aggravating circumstance the state would be relying only on a certified copy of a federal bank robbery conviction (R. 734-735). The prosecutor then argued as follows:

²Cook was decided under Alabama's previous capital murder statute, Code of Alabama 1975, §13-11-1 *et seq.*, repealed in 1981, whereas petitioner was convicted and sentenced under the successor statute, Code of Alabama 1975, §13A-5-39 *et. seq.* Both statutes, however, provide this mitigating circumstance in identical language, so the holding of Cook is unquestionably applicable to cases under both statutes.

I think we have proved beyond any reasonable doubt, this certified copy, which has been marked for identification as state's Exhibit S-1, and introduced in evidence, that prior to this pawn shop murder-robbery, and, then, the Seymour Jewelry robbery, this man, Harry Nicks, committed the crime of bank robbery while he was armed with a deadly weapon or dangerous instrument, as defined in the code section.

(R. 774) (A copy of this page of the record is attached as part of the appendix). While the prosecutor did mention the unadjudicated robbery, the Seymour Jewelry robbery, he was arguing for the existence of the aggravating circumstance based only on the bank robbery conviction. This is consistent with the language of Code of Alabama 1975, §13A-5-49(2), set out above, which requires the previous conviction of a felony involving the use or threat of violence to the person to establish this aggravating circumstance.

As has been shown above, the prosecution used the evidence of the unadjudicated crime only at the guilt stage, and did not attempt, consistent with Alabama law, to use it at sentencing to prove an aggravating circumstance or negate a mitigating circumstance. This case thus does not fall within the category of cases into which petitioner attempts to place it.

Accordingly, this Court should deny certiorari as to this issue.

III. THE COURT SHOULD DECLINE TO CONSIDER THE ISSUE REGARDING PROSECUTORIAL ARGUMENT AS TO THE JURY'S ADVISORY SENTENCE VERDICT BECAUSE PETITIONER'S ARGUMENT IS BASED ON INACCURATE STATEMENTS OF LAW AND FACT.

Petitioner urges this Court to grant certiorari because, he claims, the lower courts are split as to whether correct statements to the jury regarding the advisory nature of its sentence verdict violate the doctrine of Caldwell v. Mississippi, 472 U.S. 320 (1985). Petitioner also claims that the prosecutor in the instant case misled the jury as to its sentencing role. Both of these assertions are incorrect.

According to petitioner, some states hold that arguments or instructions informing the jury that its verdict is advisory or a recommendation violates Caldwell only if the statements are legally inaccurate, whereas the Eleventh Circuit has decided

that such statements are unconstitutional regardless of their correctness. Respondent submits that this is erroneous. In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified in unrelated part on rehearing, Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, ___ U.S. ___, 108 S.Ct. 1106 (March 7, 1988), the Eleventh Circuit has made clear that Caldwell applies only where the jury is misled as to its sentence responsibility. Under Adams there is no error where the relative roles of the trial court and the jury are correctly explained.

Petitioner's contention that the jury was misled in his case is based on the use of the word "opinion" by the prosecutor in his argument. Whatever the merits of this purely semantic argument, it ignores the prosecutor's description at other points of the jury's decision as an "advisory verdict" (R. 732, 738-740). Petitioner himself argues that the word "verdict"

carries great weight and responsibility in criminal proceedings and conveys to jurors an appropriate obligation to diligently deliberate and speak the truth.

(petition, p. 13). Petitioner thus cannot argue that the prosecutor sought to diminish the jury's sense of responsibility in its sentence decision.

For the above reasons the Court should deny the petition as to the issue of the jury's allegedly reduced sense of responsibility in sentencing.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,
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By-

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of the foregoing Brief and Argument on the attorney for petitioner by placing said copy in the United States Postal Service, first class postage prepaid and properly addressed as follows:

Hon. Bryan A. Stevenson
185 Walton Street
Atlanta, Georgia 30303

Done this 17th day of June, 1988.

William D. Little
WILLIAM D. LITTLE
COUNSEL FOR RESPONDENT

0308v

APPENDIX

Jerry D. Murray
Official Court Reporter
Bessemer Courthouse
Bessemer, Alabama

1 After the opening statements are made,
2 then we will offer evidence. Evidence
3 will be offered. I will instruct you
4 what the law is and you will be allowed
5 to return an advisory verdict.

6 At this time we will have the
7 opening statements. Mr. Meadows.

8 OPENING STATEMENT BY MR. MEADOWS:

9 Ladies and gentlemen, I'm going to keep my
10 remarks brief at this point. You have already crossed
11 the hurdle of the guilt finding phase and have deter-
12 mined this defendant is guilty of the capital charge as
13 was stated.

14 At this point, as the judge said, it is up to you
15 to render an advisory verdict as to whether he be sen-
16 tenced to death by electrocution or whether he will be
17 given life without parole.

18 And just as you had instructions to aid you in
19 determining what legal principles you should apply in
20 determining this guilt or innocence along with the
21 facts, at this time there is also legal principles that
22 will aid you in determining whether the appropriate
23 punishment should be death by electrocution or life
24 without parole as you apply that to these same facts.

25 We are not going to introduce a whole lot of evi-
26 dence during the sentencing phase of the trial. You
27 have already heard all the evidence of the trial itself.
28 And this is the primary thing you should consider, in

Jerry D. Murray
Official Court Reporter
Bessemer Courthouse
Bessemer, Alabama

1 would have to consider aggravating circumstances and
2 mitigating circumstances.

3 I think we have proved beyond any reasonable
4 doubt, this certified copy, which has been marked for
5 identification as State's Exhibit S-1, and introduced
6 in evidence, that prior to this pawn shop murder-
7 robbery, and, then, the Seymour Jewelry robbery, this
8 man, Harry Nicks, committed the crime of bank robbery
9 while he was armed with a deadly weapon or dangerous
10 instrument, as defined in the code section.

11 There is nowhere on this document that would say
12 a bank robbery only. This 2113(d) that the judge read
13 to you out of the Code is where that bank robbery came
14 from. That is what he referred to.

15 But, more importantly, aside from this prior bank
16 robbery conviction, the main thing you need to consider
17 is the facts and circumstances surrounding the actual
18 pawn shop thing, the murder and the robbery of Mr.
19 Robert Back. I can't emphasize that too much. It was
20 just a cold-blooded execution. Harry Nicks has the
21 benefit of a nice Courtroom, and 12 jurors to sit and
22 listen to his side of the story and listen to the State
23 present its case against him this week before making
24 any determination as to what should be done. He did
25 not give Mr. Back that opportunity. Twelve people did
26 not have the opportunity to sit and decide whether Mr.
27 Back should ever die.

28 Mr. Harry Nicks made that decision himself. At